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October 22, 2007

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
c/o 236 Massachusetts Ave, N.E. Room 110  
Washington, D.C. 20002

FILED/ACCEPTED

OCT 22 2007

Federal Communications Commission  
Office of the Secretary

Re: MB Docket No. 06-121  
MB Docket No. 02-277  
MB Docket No. 01-235  
MB Docket No. 01-317  
MB Docket No. 00-244 ✓  
MB Docket No. 04-228

Dear Ms. Dortch:

On behalf of Spanish Broadcasting System, Inc., there is transmitted herewith its Comments with regard to the captioned rulemakings.

Should any questions arise with regard to this matter, kindly communicate directly with this office.

Sincerely,



Bruce A. Eisen

Enclosure

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**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

**FILED/ACCEPTED**  
**OCT 22 2007**  
Federal Communications Commission  
Office of the Secretary

In the Matter of

2006 Quadrennial Regulatory Review - Review of	)	MB Docket No. 06-121
the Commission's Broadcast Ownership Rules and	)	
Other Rules Adopted Pursuant to Section 202 of	)	
the Telecommunications Act of 1996	)	
	)	
2002 Biennial Regulatory Review - Review of the	)	MB Docket No. 02-277
Commission's Broadcast Ownership Rules and	)	
Other Rules Adopted Pursuant to Section 202 of	)	
the Telecommunications Act of 1996	)	
	)	
Cross-Ownership of Broadcast Stations and	)	MM Docket No. 01-235
Newspapers	)	
	)	
Rules and Policies Concerning Multiple	)	MM Docket No. 01-317
Ownership of Radio Broadcast Stations in Local	)	
Markets	)	
	)	
Definition of Radio Markets	)	MM Docket No. 00-244
	)	
Ways to Further Section 257 Mandate and To	)	MB Docket No. 04-228
Build on Earlier Studies	)	

**COMMENTS OF SPANISH BROADCASTING SYSTEM, INC.**

Spanish Broadcasting Systems, Inc. ("SBS") hereby submits its comments in response to the Commission's Second Further Notice of Proposed Rulemaking, FCC 07-136, released August 1, 2007 ("Second Further Notice"). In support thereof, the following is shown:

**Background**

SBS is the largest Hispanic-controlled radio broadcasting company in the United States. SBS and its affiliates currently own and/or operate 20 stations in six of the top-10 Hispanic markets, including New York, Los Angeles, Miami, Chicago, San Francisco and Puerto Rico.

SBS also owns a full-service television station and a class-A television station in the Miami, Florida television market. SBS has previously filed comments with regard to the radio and television ownership rules addressed by the Commission in its Further Notice of Proposed Rulemaking, 21 FCC Rcd. 8834 (2006). In those comments, SBS requested the Commission to repeal its TV/radio cross-ownership rule and to specifically exclude Puerto Rico from the existing and flawed Arbitron metro market definition that had been used in the past to calculate limits of broadcast ownership.

The Second Further Notice is specifically intended to explore ways to advance minority ownership in broadcasting. Naturally, this is a matter that SBS considers to be of great importance. The Second Further Notice has identified various initiatives which, if adopted, could increase the number of broadcast stations owned by minorities and what the Commission refers to as Socially Disadvantaged Businesses (“SDBs”). Included within these initiatives is the possibility of Congressional enactment of a minority tax credit program which, over the years, SBS has urged both the Commission and the Congress to adopt. However, in addition to that policy, there are several other initiatives to which SBS will respond.<sup>1</sup>

#### **Minority Tax Credit**

SBS urges the Commission to continue to press the Congress to amend the Internal Revenue Code to provide for a deferral of tax on gain from the sale of telecommunication

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<sup>1</sup> Minority Media and Telecommunications Council has filed a petition for rulemaking on July 12, 2007 that proposes a change unto Commission Rules to assist minorities and women to purchase radio facility (RM-11388). SBS supports the rulemaking petition. Further, all of the initiatives should be seen in the light of Commissioner Michael J. Copps’ letter published by the Washington Post on September 26, 2007 stating that while racial and other minorities are more than 30% of the United States population, they own just 3.26% of all commercial television stations and 7.7% of full-power radio stations (Free Press study). Commissioner Copps refers to these statistics as “a national disgrace.”

businesses in order to promote diversity of ownership of such businesses.<sup>2</sup> SBS recognizes the inability of the Commission, itself, to implement such a policy, but the Commission can assume an active and persuasive role before the Congress. Such a policy would benefit the broadcasting industry, in particular, because it would create incentives to transfer and assign permits and licenses to SDBs and minority entities.

It is sometimes asserted that during the time that the tax certificate program had been in place, minority ownership levels had not risen appreciably. However, since the elimination of the tax certificate program in 1995, the broadcasting industry has been subject to very significant consolidation that has made it extremely difficult for minorities and SDBs to enter the industry as facility owners. Under a revived tax certificate policy, an owner of a radio or television station could sell to a minority-owned enterprise or an SDB and thereby defer capital gains and/or reduce the basis of depreciable property. The diversity of broadcast ownership would be enhanced by such a program because it would often lower the price of the station for a minority or SDB buyer, thus addressing the continuing problem of a lack of minority access to capital.<sup>3</sup>

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<sup>2</sup> Senator John McCain had introduced the Telecommunications Ownership Diversification Act of 2003, a bill to amend the IRC (S.267). On January 30, 2003, the bill was referred to the Committee on Finance. No further action was taken.

<sup>3</sup> When the tax certificate policy was in effect, many minority broadcast owners had taken advantage of tax certificates at some point. There are statistics which show that in almost 50% of these cases, licenses were later transferred, but that the average holding period exceeded four years. Moreover, most tax certificates were used to acquire relatively small radio and television stations, so that it is difficult to see how there could have been significant abuses in the program. Cf. some of the “minority-controlled” companies that received construction permits through the Commission’s defunct comparative broadcast proceedings that entitled the proposed minority owners to a “plus” when weighed together with other comparative factors. A tax certificate program would not be a risk to the integrity of the Commission’s rules and would be premised on incentives, not entitlements.

SBS has the advantage of a very real historic perspective on a tax certificate program. SBS was founded in 1983. At the time of the Cuban revolution, its founder, Raul Alarcon, owned radio stations that were ultimately seized by the Castro government. After emigrating to the United States and becoming a United States citizen, Mr. Alarcon and his son, Raul Alarcon, Jr., worked hard at Spanish-language radio for ore than 20 years until they were able to buy a small AM radio station in New Jersey. Nearly 25 years later, SBS is the largest Hispanic-owned media company in the United States. But, what is truly important to this rulemaking is the fact that SBS' major market radio stations, each of which broadcasts Spanish-language programming, was purchased with a tax certificate.<sup>4</sup>

The tax certificate program that failed to pass Constitutional muster and which was finally repealed, drew far too much attention to the effect on sellers and buyers. What is missing from past analyses is the impact of the program on the minority community. In order to enter the industry, one needs to raise capital and find a buyer who is willing to transfer or assign the station. For minority buyers, such opportunities have been minimal in the past. With the repeal of the tax certificate program, the opportunities have dried up even further. The Commission's relaxation of its ownership restrictions has made it possible for some broadcasters to purchase multiple stations in markets previously closed to them. Hence, a new group of well financed bidders for available licenses has tended to foreclose many buying opportunities for minorities.

Perhaps just as telling is the fact that even if a minority buyer is able to raise the money to buy a station, he or she must then compete with established companies, some with huge resources, that can offer sellers the possibility of transactions that may enable the seller to defer

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<sup>4</sup> These stations include facilities which served northern New Jersey and New York City, Los Angeles, Miami, and Key Largo, Florida.

tax on the gain from the sale.<sup>5</sup> Notwithstanding these extreme disadvantages, a tax certificate program promises to bring minority buyers back to the bargaining table because they may be able to offer similar tax advantages to a seller. Such a program is possible without “mandates,” “set asides” or “quotes.” It is entirely voluntary.

SBS has paid market price for the stations that they have purchased in the past. However, the initial purchases of SBS core stations could have not been consummated without tax certificates. The program truly leveled the playing field in the high stakes of broadcast business. A resuscitated program would encourage sellers to transfer or assign stations to minority buyers and to let the marketplace do the rest.

It is somewhat ironic that Congressional repeal of the tax certificate program came at approximately the same time that the Commission relaxed its ownership caps. The importance of the repeal can only be estimated because there is no quantitative way to determine how many transactions were defeated or essentially put on indefinite hold as a result of the negative Congressional action. What can be ascertained, however, is that subsequent to the enactment of the Telecommunications Act of 1996, station prices rose to their highest levels, and consolidation moved forward at an alarming pace. This made it extremely difficult for minority and SDB entrepreneurs to marshal revenues that could be used to maintain broadcasting businesses where a single company exercised significant control over the market. Unlike most industries, one cannot enter the radio broadcasting industry at will. Access to capital continues to be the major impediment to successful minority ownership of radio and television stations.

The Commission notes, of course, that there are Constitutional issues that must be overcome in order to re-enact tax certificate legislation. Hence, the question of whether or not

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<sup>5</sup> Some such transactions involve tax free asset to asset swaps or stock to stock swaps.

such a program would represent an unfair preference based on race must be factored into the analysis. As a result of the Supreme Court's decision in Adarand Constructors, Inc. v. Peña, 515 US 200 (1995), programs that provided "advantages to minorities became suspect." However, the tax certificate program, such as the one proposed in the "Telecommunications Ownership Diversification Act of 2003" could satisfactorily address Adarand concerns.

The bill provides that eligible purchasers are "economically and socially disadvantaged businesses," defined as entities which are designated by the Secretary of the Treasury as such and which, inter alia, do not have an attributable ownership interest in television broadcast stations having an aggregate national audience reach of more than five percent as defined by the Commission under its rules, or an attributable ownership interest in more than 50 radio stations nationally, and radio stations within a combined market share exceeding ten percent of advertising revenue or the relevant market as defined by the Commission. There are also, of course, ownership and control factors that must be measured with perspective buyers. For instance, with regard to publicly traded corporations, control is sufficient if more than 50 percent of the total combined voting power of all classes of stock entitled to vote are U.S. citizens and members of an economically or socially disadvantaged class under-represented or the ownership of broadcast facilities. To the extent that the Further Notice invites comments on the definition of SDB's, SBS endorses the definition used in Senator McCain's bill. Thus, SDBs would include most minorities and some non-minorities. The definition is of importance for future Commission regulation. See, Prometheus Radio Project, et al. v. FCC, 373 F.3d 372, 428, f.n. 70 (3rd. Cir. 2004).

The Commission correctly notes that "measures to facilitate minority and female broadcast entry that are based on racial or gender classifications must satisfy the heightened

Constitutional standards that apply to governmental preference for minorities and women under the Equal Protection Clause.” The Commission also cites the Supreme Court’s ruling requiring that governmental classification based on race must be analyzed under strict scrutiny, and are constitutional only if such classifications are narrowly tailored measures that further a compelling government interest. See, Adarand Constructors, Inc. v. Peña, supra.

SBS believes that adoption of the policies urged by Minority Media and Telecommunications Council and these comments, do not violate the United States Constitution. None of the endorsed measures prevent entry into the broadcasting industry. In Grutter v. Bollinger, 539 US 306 (2003), the United States Supreme Court held that the Equal Protection Clause does not preclude a law school’s “narrowly tailored” use of race in admissions if there is a compelling interest in obtaining the benefits that flow from diversity. The Court further concluded that acceptance or rejection was not based automatically on race, and that other factors could contribute to diversity as meaningfully considered along side race. In the various proposals included within the Second Further Notice, there is ample room for the kind of review approved by the Court. For instance, with regard to a revived tax certificate policy, SDBs would include small businesses under guidelines established by the Small Business Administration as well as minorities and women.



## **Unbuilt Construction Permits**

The Commission's Second Further Notice addresses the possibility of allowing minority groups to purchase unbuilt construction permits and to receive sufficient time to construct the stations, even though the construction permit is close to expiration from having been unbuilt for over three years. SBS supports this proposal because it would carve out an exception to the rules that would not result in widespread abuse, but would have the clear potential of fostering minority ownership. Given the gross under-representation of minorities and SDBs in broadcast ownership, it would clearly serve the public interest to allow appropriate applicants to require and to build out already approved construction permits which are about to expire. Section 73.3598 of the Commission's rules provides that a construction permit must be built out in three years, unless the time is tolled. Once the construction period expires, the permit is of no consequence and literally disappears. SBS urges the Commission to allow the permittees of expiring construction permits to sell them to any SDB or minority group that promises to complete construction of the relevant facility within further time specific as reasonably determined by the Commission.<sup>6</sup>

In allowing an exception to the construction permit rule, the Commission would provide another route for a new voice in the market and result in the passage of an expiring construction permit to an alternative company that would bring a new voice to the market. It would also help the permittee who might have attempted to construct on time but, for less than acceptable reasons failed to complete construction.

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<sup>6</sup> There is presently pending a petition for rulemaking filed by Entravision Holdings, LLC that would allow for a build-out during the time remaining on the original construction permit or one and a half years, whichever is greater.

### **Distress Sales**

The Second Further Notice also addresses the defunct distress sale program. The distress sale program was part of the Commission's minority ownership policy. See, Statement of Policy on Minority Ownership of Broadcast Facilities, 68 FCC2d 979 (1978). The Distress sale policy allowed a broadcaster whose license had been placed in jeopardy through the designation of a hearing for non-renewal or revocation of its license, to transfer or assign the station license to a company that was minority-controlled for a price that could not exceed 5% of the station's fair market value. Invoking the policy allowed the licensee to escape the possibility of a loss of license and, further, save the Commission great expense and time of conducting a hearing. During the life of the distress sale policy, approximately 50 stations were sold to minorities. While the number of station licenses placed into revocation or renewal hearings has dramatically decreased over the years, SBS nevertheless supports the reinstitution of this program as a further basis by which minorities can achieve broadcast ownership.

### **Investment by Those With Attributable Media Interests**

The Second Further Notice also includes a valuable proposal that investors with attributable media interests be allowed to invest in stations controlled by SDBs and minorities, even if such investment would otherwise abrogate existing multiple ownership rules. This particular relaxation of the rules would benefit the industry in general and surely foster a new diversity of ownership. Stations that might otherwise find themselves in trouble, for whatever reasons, could be saved by an infusion of monies from those parties that might most be expected to understand the business and assist in the resurrection of more viable facilities, assuming such facilities were controlled by the proper owners. There is so much that underlies the lack of broadcast ownership by minorities and disadvantaged parties and so much anecdotal information

that shows the difficulty of successfully maintaining enterprises controlled by such parties that new strategies must be reasonably fashioned and put into place. By allowing investments that might heretofore have violated the multiple ownership rules, there is a chance that the Commission could foster the growth and viability of a number of broadcast stations that might otherwise have difficulty in succeeding in the present consolidated environment.

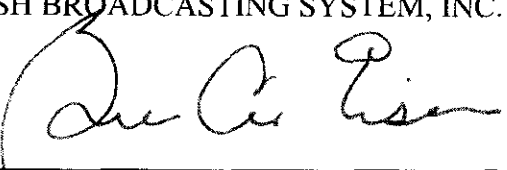
**Conclusion**

For the reasons set forth above, SBS urges the Commission to adopt those suggestions offered in these comments. The moderate regulatory changes suggested in these comments will foster the ownership of broadcast stations by minority owners and SDBs. There are few more important priorities for the Commission to address at this time.

Respectfully submitted,

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By: \_\_\_\_\_

  
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